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No. 1029

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1964.

PACIFIC NATIONAL INSURANCE COMPANY,
Petitioner,

v.

TRANSPORT INSURANCE COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

EDWARD BRODKEY,
315 Plymouth Court,
Chicago, Illinois 60604,
Attorney for Petitioner.

St. Louis Law Printing Co., Inc., 415 N. Eighth Street. CEntral 1-4477.

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To the United States Court of Appeals for the Eighth Circuit.

Petitioner, Pacific National Insurance Company, a corporation, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above entitled cause on February 12, 1965.

OPINIONS BELOW.

The basic decision involved in this application is a judgment of the Circuit Court of Greene County, Arkansas, entered on the general verdict of a jury in a personal

injury suit, which judgment was affirmed by the Supreme Court of Arkansas in the case of **Superior Forwarding Co. v. Sikes**, 233 Ark. 932, 349 S. W. 2d 818 (1961). The memorandum opinion of the United States District Court for the Eastern District of Arkansas in the instant case is reported in **Transport Insurance Co. v. Manufacturers Casualty Insurance Co.**, 226 F. Supp. 251 (E. D. Ark. 1964), and appears in the Record filed herewith (R. 111). The Opinion of the Court of Appeals for the Eighth Circuit has not yet been reported, but appears in said Record (R. following 129, pages numbered 1-12).

JURISDICTION.

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on February 12, 1965. The jurisdiction of this Court is invoked under 28 U. S. C., § 2101 (c).

QUESTIONS PRESENTED.

(1) Whether or not an insurance company which, having satisfied a judgment entered on a general verdict against its insured and its insured's employee, thereby becoming subrogated to the rights of its insured against such employee, has, without a prior suit by said subrogee against its said employee, a directly enforcible claim against that employee's insurance company of sufficient immediacy and maturity to constitute a case or controversy within the jurisdiction of the Federal Courts under Article III, § 2, of the Constitution of the United States, and 28 U. S. C., § 1332 (a) (1).

(2) A subordinate question presented is: Whether or not a Federal Court which makes a finding that one of two defendants in a prior State Court personal injury action, against both of which defendants a State Court jury had returned a general verdict *in solido*, was liable **only** vicariously and not for any independent negligence

of its own, making such finding entirely on the basis of the Federal Court's own interpretation of said general verdict, in a case found by the State Supreme Court to involve conflicting testimony as to fault, amounts to such an invasion of the province of the jury as to constitute a denial of the right to jury trial guaranteed by the Seventh Amendment to the Constitution of the United States and the applicable Statutes.

(3) Another subordinate question is whether or not a United States Court of Appeals which sanctions a procedure in a District Court having the effect of permitting an injured person to bring a "direct action" against an insurance company allegedly insuring his claimed wrongdoer, in a State prohibiting such "direct action" by statute, so far departs from applicable state law as to require the supervision of this Court.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED.

Article III, § 2, of the Constitution of the United States provides in relevant part:

> "The judicial Power shall extend to all Cases, in Law and Equity * * *; * * to Controversies * * — between Citizens of different States, * * *."

28 U. S. C., § 1332 (a) (1), provides in pertinent part:

> "The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—
>
> "(1) citizens of different States; * * *."

STATEMENT.

The antecedent of this case in the federal courts was a personal injury suit filed in the Circuit Court of Greene County, Arkansas, subsequently appealed to the Supreme

Court of Arkansas. The present suit is an asserted diversity action in the federal courts by one insurance company against another, claiming "indemnity."

In 1957, a man named Sikes was injured when a large crate containing a refrigeration unit fell on him, either, as he claimed (R. 3), while it was being unloaded from a truck, or, as defendants claimed (R. 19), after the unloading had been completed. Sikes brought suit in an Arkansas State Court, naming as defendants (1) Superior Forwarding Company, a licensed interstate carrier, which was the operator of the truck, (2) one Tommy Russell, who owned the truck and leased it complete with a driver, to Superior, (3) Fred Russell, the truck driver, and (4) "others" (R. 3).

During the course of proceedings in the State Court, Tommy Russell, the lessor of the truck, having previously joined in a demand for a jury trial, demurred to the plaintiff's complaint, and the Court sustained his demurrer and dismissed plaintiff's action as to him (R. 48). The case proceeded to trial before a jury, as to the other two defendants. Transport Insurance Company, the plaintiff below, conducted the defense of both defendants (R. 3).

Plaintiff Sikes' complaint charged, *inter alia*, that defendant Superior Forwarding Company was negligent (1) in its failure to provide its agent Fred Russell with proper unloading devices, (2) in its failure to provide sufficient personnel and helpers to accompany said driver and assist him in unloading, and (3) in delegating authority to unload said truck to a driver unskilled in proper unloading procedures (R. 50). The jury was charged generally with respect to the negligence of both defendants (R. 56). The Arkansas Supreme Court found that the evidence as to negligence was conflicting as to just what occurred with the unloading, 349 S. W. 2d 818, 820. The jury returned a general verdict of $35,000 against both defendants (R.

27). It did not find that the liability of Superior Forwarding Company, the employer, was solely vicarious. Judgment was entered against both defendants, employer and employee, *in solido*. On appeal, the Supreme Court of Arkansas, in opinion, affirmed the judgment of the Arkansas trial court, **Superior Forwarding Co. v. Sikes**, 233 Ark. 932, 349 S. W. 2d 818 (1961), stating (349 S. W. 2d 820) that

> "* * * this Court does not set aside a jury verdict merely because it is against the preponderance of the evidence."

Transport Insurance Company, the plaintiff below, paid and satisfied the judgment of Sikes against Superior Forwarding Company and Fred Russell (R. 112), and, as asserted subrogee of Superior, brought suit directly against defendant Pacific National Insurance Company in Federal Court, on the theory that it was entitled to indemnity or contribution from the insurer of the truck owner Tommy Russell or of the driver Fred Russell. The United States District Court for the Eastern District of Arkansas, in a bench trial, found for the plaintiff Transport (R. 120-121), in a memorandum opinion (R. 111), and entered judgment accordingly (R. 121-122). From this adverse ruling, defendant Pacific National Insurance Company appealed to the United States Court of Appeals for the Eighth Circuit, urging that the federal courts lacked jurisdiction, since this direct proceeding was not one between parties standing in adverse position of sufficient immediacy and maturity to constitute a case or controversy within the meaning of the Constitution and applicable Statute. Appellant also there urged that the District Court below erred in (1) considering itself bound by a supposed finding of the Arkansas Courts that Superior was not negligent, (2) holding as a matter of law that an undisputed contract leasing the truck did not control the entire liability of the parties, and (3) refusing equitably to reassess dam-

ages. The Court of Appeals affirmed, categorically rejecting all the foregoing contentions of appellant.[1]

It would appear that there are here present special and important reasons for requesting this Court to review the judgment of the United States Court of Appeals for the Eighth Circuit, which may affect the uniform and appropriate administration of like proceedings in this and other federal courts.

REASONS FOR GRANTING THE WRIT.

I.

It would appear that there is here an inter-circuit conflict on an important federal question.

Few questions are as fundamental to the measurement of the limited judicial power of the federal courts as what constitutes a case or controversy. In **Aetna Life Insurance Co. v. Haworth**, 300 U. S. 227 (1937), this Court granted a writ of certiorari to our same Court of Appeals for the Eighth Circuit to determine the meaning of "actual" controversy as that term is used in the Declaratory Judgment Act, 28 U. S. C. § 400. Mr. Chief Justice

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[1] With respect to petitioner's undisputed contention that the lease under which Tommy Russell furnished the truck and driver to Superior Forwarding Company provided that Superior was to carry the liability insurance on the vehicle, thus making it solely liable for Sikes' injury, on "the reasonable interpretation of the agreement that it should protect against all liability arising out of the operation", *American Fidelity & Casualty Co. v. Simmons*, C. A. 4, 1958, 253 F. 2d 634, 636, "not warrant[ing] an implication that the insurance carrier would have redress against lessor or lessee for indemnity", 153 F. Supp. 660, the Court of Appeals stated (Opin. p. 10) that the trial court accepted the rationale of the *Simmons* case insofar as the rights of Superior and Tommy Russell are concerned, but, like the trial court it was not inclined to "stretch" the meaning of the agreement to the point where its subrogee is prohibited from enforcing a right against one who is not a party to the agreement. Cf. *American Fidelity & Casualty Co. v. Johnson*, Ky. 1960, 336 S. W. 2d 351.

Hughes concluded (Opinion, pp. 239-240) that "The Declaratory Judgment Act of 1934, in its limitation to 'cases of actual controversy,' manifestly has regard to the constitutional provision and is operative only in respect to controversies which are such in the constitutional sense. The word 'actual' is one of emphasis rather than of definition."

In the case at bar, the Courts below rejected petitioner's contention that an insurance company which satisfied a judgment against its insured and another, thereby becoming subrogated to the rights of that insured against the other defendant, did not, without more, have a claim against the other defendant's insurance company of sufficient immediacy and maturity to constitute a case or controversy within the Constitutional and Statutory language, such as to warrant a direct action against the latter insurance company in the federal courts. In its opinion, at page 5 (following R. 129) the Court of Appeals said:

> "* * *, we are satisfied that at the time this action was commenced, appellant and appellee stood in adverse positions to one another, and appellee's claim was a present, specific right, ripe for determination. The following factors are significant: (1) Fred Russell was an insured under appellant's policy; Superior was insured by appellee; (2) suit had been brought by Sikes against Superior and Fred Russell; (3) Appellant refused to assume the defense of Fred, and appellee in an effort to exonerate its insured from vicarious liability for the negligence of Fred, undertook the defense of the latter; (4) judgment was rendered against Superior and Fred and affirmed on appeal; (5) appellee paid the full amount of the judgment.
>
> "Thus posited, appellee as the subrogee of Superior, was entitled to maintain this action and se-

> cure an adjudication of a real and substantial controversy, to-wit, the question whether it was entitled to recover by way of indemnity, the amount it was required to pay in satisfaction of the Sikes' judgment. **The argument that it was necessary to first secure a judicial determination that Superior was vicariously liable, in a proceeding directly against Fred Russell has no appealing force.**[2] **If Superior was entitled to maintain such an action against Fred, we are satisfied that on this record Superior's insurer may proceed against Fred's insurer.** * * *" [Emphasis supplied.]

In a footnote, numbered 2, the Court disclosed its rationale for the foregoing, as follows:

> "If, as appellant argues, such a determination is a prerequisite to this action, we believe the answer may be found in the Sikes' case. Although **the state trial court and the Arkansas Supreme Court were not required to and did not in fact expressly rule the question whether Superior's liability was solely vicarious,** the undisputed facts together with the trial proceedings and the Supreme Court's opinion compel the legal conclusion that Sikes was injured as the result of Fred Russell's negligence and that Superior's liability was secondary or vicarious." [Emphasis supplied.]

With deference, petitioner represents that the record nowhere shows that Superior was free from negligence.

In its Opinion (p. 5), the Court below, to support its view that plaintiff Transport's suit was a "case or controversy" within the Constitutional language, quoted a general definition of "case or controversy" from **Muskrat v. United States**, 219 U. S. 346 (1910). It should be remembered that the **Muskrat** case **denied** jurisdiction because, while Muskrat may have had a present or future

claim against someone, he had none against the defendant United States which had "no interest adverse to the claimants", 219 U. S. 361.

In effect, the Courts below decided that the direct action there being maintained was sufficiently mature for a case or controversy despite the fact that the parties hereto had never stood in adverse position before suit was filed, simply because the plaintiff insurance company had paid a judgment against its insured and another. A suit claiming indemnity would never try the issue of whether or not plaintiff's insured was entitled to recover from defendant's insured, and it did not do so in this case.

This holding would appear to be in direct conflict with the decisions of the United States Courts of Appeals for the First Circuit in **Lizza and Sons, Inc. v. Hartford Accident & Indemnity Company**, CA 1, 1957, 247 F. 2d 262, and for the Seventh Circuit in **Travelers Indemnity Company v. Standard Accident Insurance Company**, CA 7, 1964, 329 F. 2d 329, insofar as these latter decisions define a case of sufficient immediacy and maturity to be justiciable. Cf. **Maryland Casualty Company v. Employers Mutual Liability Insurance Company of Wisconsin**, CA 2, 1953, 208 F. 2d 731.

The case of **Lizza and Sons, Inc. v. Hartford Accident & Indemnity Company**, CA 1, 1957, 247 F. 2d 262, *supra*, was an action by a sub-contractor's surety against the contractor and sub-contractor seeking a judgment declaring void certain indemnity bonds issued to the sub-contractor, on the ground that no contract had ever been entered into at the time the indemnity bond was issued. The Court of Appeals for the First Circuit held that where a surety's liability on a sub-contractor's performance bond was "contingent" at the time of suit, in that it would not be under any liability unless it was established that a valid contract had existed between the contractor and the sub-

contractor and that the sub-contractor had broken such contract with resultant loss to the contractor, and that the contractor was not able to collect from the sub-contractor, the District Court was without jurisdiction, due either to the absence of a case or controversy in the constitutional sense, or by reason of the fact that such case did not present a controversy appropriate for declaratory relief. In holding that there was lack of jurisdiction, the Court said, in relevant part (Opinion, page 265):

> "Basically, the question in each case is whether the facts alleged under all the circumstances show that there is a substantial controversy, between parties having adverse legal interests, of sufficient **immediacy and reality** to warrant the issuance of a declaratory judgment."

We believe this case stands for the proposition that where the asserted claim of the plaintiff against the defendant is "contingent", or depends for its existence upon some condition precedent or the exercise of some remedy to liquidate the right *proprio vigore*, Cf. **Hunt v. Rousmanier's Adm'rs.**, 8 Wheat. 174 (1823), the claim in question may not be regarded as so vested and mature as to be immediately actionable. In the **Lizza** case the First Circuit said (Opinion, page 265):

> "No doubt Hartford as surety for the D'Onfros had a certain interest in the eventual outcome of their disagreement with Lizza. If they should win, it could not be liable on its bond. But at the time Hartford brought its suit Lizza had made no demand upon Hartford and there was no way to tell whether it ever would make demand. That depended upon whether or not Lizza suffered any loss, for without loss no action would lie on the bond."

This is strictly analogous to our case: At the time of filing the suit below, the Court of Appeals found that there had

been no determination of any liability of Fred Russell to Superior Forwarding Company, without which there could be no basis for any claim of Superior against this petitioner. Any liability of this petitioner would be, in a very real sense, at best "contingent", as characterized by the First Circuit.

Travelers Indemnity Company v. Standard Accident Insurance Company, CA 7, 1964, 329 F. 2d 329, was an action by a restaurant operator's general liability insurer against the restaurant operator's truck liability insurer for a judgment declaring that the defendant had a duty to defend the restaurant operator as an additional insured in an action brought by a pedestrian who fell through an elevator opening in the sidewalk which had been opened to permit the produce supplier to deliver vegetables. The Court of Appeals for the Seventh Circuit reversed a judgment of the District Court, holding that it had no jurisdiction over the action as there was no substantial controversy between parties having adverse interests of sufficient immediacy and reality to warrant issuance of a declaratory judgment. The Court said, in pertinent part (Opinion, page 330):

> "We think the district court had no jurisdiction because there was no 'substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.' **Maryland Cas. Co. v. Pacific Coal & Oil Co.**, 312 U. S. 270, 273, * * * (1941). * * *
>
> "In Haworth and Pacific Coal, insurers were suing their insureds, but in the latter, Orteca, a damage plaintiff against the insured, was joined with the insured in the declaratory judgment action by the insurer. The Court, on the authority of Haworth, decided that there was an actual controversy between the insurer and insured. It decided too that the insurer's suit against Orteca was not 'too remote' for decision. The reason for this holding was the possible

> anomaly, otherwise, of Orteca succeeding in his damage suit and then successfully proceeding on his judgment, under Ohio law, against the insurer who might be found not obligated under the policy in the declaratory judgment action."

No such anomaly or embarrassment would obtain, in the case at bar, if Transport, the respondent herein, were required to establish its right, if any, as subrogee of Sikes, against Fred Russell, the truck driver, before bringing suit against petitioner. Certainly this case, in the Seventh Circuit, establishes, like that in the First Circuit, that one may have rights which are not sufficiently mature to be a case or controversy and that merely filing a suit in which those rights are asserted does not endow them with a maturity they would not otherwise possess.

It would thus appear that the foregoing decisions of the First and Seventh Circuits conflict with that of the Eighth Circuit in the case at bar, calling for resolution by this Honorable Court.

II.

It is further believed that the Court of Appeals below may have decided an important federal question in a way in conflict with the applicable decisions of this Court.

As heretofore stated, the trial of the personal injury suit in the State Court was to a jury. There, defendant Superior Forwarding Company was charged in plaintiff Sikes' complaint with acts of negligence entirely independent of any charges against its driver Fred Russell. The question of whether Superior was liable for any negligent acts of omission or commission on its own part or whether its liability was solely vicarious under the doctrine of *respondeat superior* was for the jury and not for any court, state or federal, to decide.

The Court of Appeals expressly conceded in footnote 2 on page 6 of its opinion (following R. 129) that

> "the state trial court and the Arkansas Supreme Court were not required to and did not in fact expressly rule the question whether Superior's liability was solely vicarious."

In making its own independent finding, somewhat short of an unequivocal determination that Superior's liability was **solely** vicarious, on the basis of "undisputed facts together with the trial proceedings",[2] the Court drew a

> "legal conclusion that Sikes was injured as the result of Fred Russell's negligence and that Superior's liability was secondary or vicarious",

thereby effectively acting to deprive the parties of the right to jury trial as to that issue.

The Seventh Amendment to the Constitution of the United States, U. S. C. A. Const. Amdt. VII, provides:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the rights of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

We believe the foregoing finding of solely vicarious liability constitutes such a prohibited reexamination and presents an important federal question.

Appellate review in Federal Courts is limited ultimately by this amendment. **Lumbermen's Mutual Cas-**

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[2] The record shows (R. 25) that Superior was legally and rightfully in exclusive control of the truck, and therefore entirely capable of its own independent negligence in its omission to provide against foreseeable casualty of which it had knowledge, as charged in Sikes' complaint, apart from any vicarious liability, and independent of the existence or non-existence of any duty to unload the truck. See *Harper & James*, The Law of Torts (1956), § 26.1, p. 1362, fn. 4; 1 Restatement of Agency, § 213, Comment *d*; 2 Restatement of Torts, § 411; *Fletcher v. Baltimore & Potomac Railroad*, 168 U. S. 135 (1897).

ualty Co. v. Elbert, 348 U. S. 48 (1954). A United States Court of Appeals has no jurisdiction to re-examine facts tried by a jury in any other manner. **Parsons v. Bedford**, 28 U. S. 433, 448 (1830), **Williamson v. Osenton**, 220 F. 653 (1915). Preservation of this constitutional right to jury trial under federal diversity jurisdiction requires that questions of fact be left to the jury and that findings of fact by a jury be left undisturbed unless reasonable men must conclude that there is insubstantial evidence in their support. **Peterson v. Exum**, CA 9, 1960, 283 F. 2d 499. This amendment is a limitation on federal appellate courts, since at common law appellate courts could not revise a verdict. **Marsh v. Illinois Central R. Co.**, CA 5, 1949, 175 F. 2d 498. See also, **Liberty Mutual Insurance Co. v. Thompson**, CA 5, 1949, 171 F. 2d 723. This amendment and its ban on reexamination of facts is applicable to state cases coming to the Supreme Court. **New York Times Company v. Sullivan**, 376 U. S. 283, 285n (1964), **Chicago etc. R. Co. v. Chicago**, 166 U. S. 242 (1897).

Further, this Court has repeatedly proclaimed in cases dealing with the Federal Employers Liability Act, the Federal Safety Appliances Act, the Jones Act, the Federal Tort Claims Act and others that

> "This Court has previously held in many cases that where jury trials are required, courts must submit the issues of negligence to a jury if evidence might justify a finding either way on those issues."

Wilkerson v. McCarthy, 336 U. S. 53, 55 (1948), and cases there cited.

In **Ferguson v. Moore-McCormack Lines**, 352 U. S. 521, 523 (1956), this Court observed:

> "Because the jury **could** have so concluded, the Court of Appeals erred in holding that respondent's motion for a directed verdict should have been

granted. 'Courts should not assume that in determining these questions of negligence juries will fall short of a fair performance of their constitutional function.' **Wilkerson v. McCarthy**, 336 U. S. 53, 62." [Emphasis ours.]

In our case, the Supreme Court of Arkansas said, 349 S. W. 2d 820, only that

> "The jury **could** have found from the evidence that Fred Russell * * * was negligent in the manner of unloading the equipment * * *." [Emphasis supplied.]

We take this to mean that the jury could also have found Russell not negligent. And surely, it does not mean that the jury could not have additionally found Superior Forwarding Company also negligent.

Again, in **Carter v. Atlanta & St. Andrews Bay Railway Co.**, 338 U. S. 430, 435-436 (1949), this Court in commenting on the propriety of instructions in a case admitting of contributory negligence said:

> "In ruling on petitioner's general negligence allegations the trial court fell into errors in its charge on contributory negligence which occur so frequently that we will discuss them briefly. The charge is replete with phrases such as, '* * * you should find his [the petitioner's] own negligence was the proximate cause of whatever injury followed,' the verdict must be for the respondent. With proper explanations the court could have advised the jury that if petitioner's **own** negligence was the sole proximate cause of his injury, the verdict must be for respondent; but here the court again and again used such phrases as 'if you should find his injury was directly or proximately caused by his own negligence,' verdict must be for the railroad; * * * The negligence of the petitioner and that of the railroad should have been submitted to the jury, * * *."

The instructions given in the **Carter** case are reminiscent of the general instructions given in ours, and there is no telling how the jury reacted with respect to them.

It is thought that the following quotation from the opinion of this Court in **Rogers v. Missouri Pacific R. Co.**, 352 U. S. 500, 505-507 (1956), quoted with approval in **Webb v. Illinois Central Railroad Co.**, 352 U. S. 512-516 (1956), is as apt in the case at bar as in an F. E. L. A. case:

> "Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence. Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death. Judges are to fix their sights primarily to make that appraisal and, if that test is met, are bound to find that a case for the jury is made out whether or not the evidence allows the jury a choice of other probabilities."

See also **Tipton v. Socony Mobil Oil Co., Inc.**, 375 U. S. 34 (1963); **Dennis v. Denver & Rio Grande Western Railroad Co.**, 375 U. S. 208 (1963); **Eichel v. New York Central Railroad Co.**, 375 U. S. 253 (1963); **Mercer v. Theriot**, 377 U. S. 152 (1964); **Lavender v. Kurn**, 327 U. S. 645, 653 (1946).

In **Dennis v. Denver & Rio Grande Western Railroad Co.**, 375 U. S. 208 (1963), *supra*, this Court said (Opin. p. 210):

> "In this case, petitioner's evidence, though vigorously disputed, was sufficient to support the jury's conclusion that respondent's negligence contributed to the injury. Hence, 'the appellate court's function [was] exhausted,' **Lavender v. Kurn**, *supra*, at 653, and it could not properly substitute its judgment for that of the jury and decide, as the Supreme Court of Utah did here, that 'it seems quite inescapable that it was [petitioner's] own conduct . . . that resulted in the regrettable injury.' * * *"

Moreover, this Court has not confined the exercise of its discretion to grant certiorari for denial of the Constitutional right to jury trial to cases involving the above noted Acts of Congress. It recently granted the writ in a wrongful death action brought strictly under Louisiana state law, in **Mercer v. Theriot**, 377 U. S. 152, 84 S. Ct. 1157 (1964), because "The jury's verdict should not have been disturbed" by the Court of Appeals. 87 S. Ct. 1160.

In such cases as the foregoing, this Court has condemned directing verdicts, entering judgment notwithstanding a jury's verdict, instructing the jury improperly and other acts of the Judge which had the effect of taking a jury matter from the jury's consideration. We believe it was no less such an act when the Courts below undertook to find the employer-defendant in effect not guilty of any negligence, something which the State Court jury which heard the case declined to do.

The importance of the finding that the principal defendant, Superior, was liable **only** vicariously was to exonerate it from any independent negligence such as would have precluded its recovery from the driver, Fred Russell, on any theory of indemnity or contribution, since it is elementary that there can be no claim to indemnity or contribution as between joint tort feasors or parties *in pari delicto*. **Fidelity & Casualty Co. of New York v.**

Federal Express, C. C. A. 6, 1943, 136 F. 2d 35, 40, 42, **United States v. Acord**, C. A. 10, 1954, 209 F. 2d 709, 715, 716. And see **Kansas City Operating Corporation v. Durwood**, C. A. 8, 1960, 278 F. 2d 354, 358. It follows that without a showing that it was entirely free from negligence, Superior had no claim against Fred Russell, lacking which any right it might have against this petitioner would be "contingent", immaterial and unenforcible.

And if it be suggested that "undisputed facts" sustain the present decision of wholly vicarious liability, it should be remembered that the Arkansas Supreme Court itself, after reviewing the same evidence, found (349 S. W. 2d 820):

> "True, there is **considerable conflict** in the evidence as to just what occurred in connection with the unloading." [Emphasis supplied.]

To paraphrase the statement of this Court in **Wilkerson v. McCarthy**, 336 U. S. 53, wherein this Court said, at page 55 of the opinion:

> "The opinion of the Utah Supreme Court strongly indicated, * * * that its finding of the absence of negligence on the part of the railroad rested on that court's independent resolution of conflicting testimony",

in our case, the opinion of the United States District Court and that of the Court of Appeals below strongly indicate that the finding by those federal courts of an absence of negligence on the part of the interstate truck carrier rested on those court's **independent** resolution of testimony declared to be conflicting by the Supreme Court of Arkansas.

Nowhere in the opinion of the Court of Appeals for the Eighth Circuit does it say that the District Court was not the finder of the fact that the employer-defend-

ant was free from negligence. Its opinion asserts only that the District Judge was correct in making such a finding, according to the evidence adduced before the State trial court, and it infers that such a finding was implicit in the general verdict of the jury, if one takes into consideration the evidence adduced at the personal injury trial. Again, paraphrasing the position of this Court, as expressed on page 60 of the opinion in **Wilkerson v. McCarthy**, 336 U. S. 53, 60:

> "It was only as a result of its inappropriate resolution of this conflicting evidence that the [Court of Appeals] affirmed the action of the [Federal] trial court in [exculpating the employer-defendant from negligence]."

The decided cases support the law that there is nothing implicit in a general verdict beyond those findings necessarily made in order to sustain it. Cf. **Burton v. Kemp**, 378 S. W. 2d 667, 669 (Ark. 1964). Such a finding was found to be unnecessary in our case (Opin. below, p. 5 fn 2). In **Security Insurance Co. of New Haven v. Johnson**, C. A. 10, 1960, 276 F. 2d 182, cited to the Court of Appeals on oral argument below, the Court said in relevant part (Opinion, page 187):

> "* * * the detailed evidence before the jury in the state court could not have enabled the federal trial court, nor does it permit us, to determine upon exactly what alleged ground or grounds of negligence the jury found the railroad liable; only that it found it negligent in one or more of the ways charged in the complaint, * * *.
>
> * * * * * * *
>
> "* * * The complaint in the state court action charged that the death of the deceased was directly and proximately caused by * * *. It was further charged that the defendant railroad was negligent

(a) [there follow five specific charges of negligence contained in plaintiff's complaint.]

* * * * * * *

"The state court instructed the jury upon all of these theories of liability. Whether or not there was evidence to show that the railroad had actual notice of the unsafe condition, it is patent that the jury could have based its general verdict wholly upon the railroad's failure to discover, in the exercise of reasonable care, the dangerous situation * * *." (Opin. p. 188.)

In the case at bar, the Supreme Court of Arkansas said (349 S. W. 2d 818, 820) only that the jury "could have found" that Fred Russell was negligent. It is most respectfully submitted that such an observation, made for the sole purpose of determining whether or not the jury's verdict was supported by substantial evidence is a far cry from a determination that Superior was in no way negligent in the Sikes case. The trial court charged the jury with respect to the negligence of both defendants, and who is to say that the jury returned its verdict and assessed its damages without reference to any possible fault of Superior? It seems more likely that the jury assessed what it conceived to be the cumulative neglect of all the defendants. Certainly their liability was not mutually exclusive. Anything beyond that probability is the purest speculation. We believe it was inappropriate for the District Judge to interpret what the Arkansas jury found in this instance.

In his specially concurring opinion in the **Wilkerson** case, at 336 U. S. 70, Mr. Justice Douglas notes:

"From this group of cases three observations can be made·

* * * * * * * *

"(2) The criterion governing the exercise of our discretion in granting or denying certiorari is not

who loses below but whether the jury function in passing on disputed questions of fact and in drawing inferences from proven facts has been respected.

"(3) The historic role of the jury in performing that function * * * is being restored in this important class of cases."

It would thus appear that the opinions below conflict with the position heretofore taken by this Court requiring submission of disputed matters to the jury, and not re-examining and modifying its verdict.

III.

It would also appear that the Courts below decided an important state question in a way in conflict with applicable state law.

The effect of the decision presented here for review is to permit a "direct action" by an injured person against his tort-feasor's insurer. By subrogation, Transport, the respondent herein, stands in the place of Superior, its insured. Instead of suing the person claimed to be responsible for Sikes' injury, it brings a direct action against that person's asserted insurer, with whom it has no privity.

Such direct actions are prohibited under Arkansas state law. **Universal Automobile Insurance Co. v. Denton**, 1932, 185 Ark. 899, 50 S. W. 2d 592, **National Mutual Casualty Co. v. Blackford**, 1940, 200 Ark. 847, 141 S. W. 2d 54, construing Act 196 of 1927, p. 667, sections 7774 and 7775, Pope's Digest.

The Arkansas Statute in point, Ark. Stat. Ann. (1947), Sec. 66-527, reads, in relevant part:

"**Injured Person Subrogated to Right of Insured.** * * * such injured person, * * * may maintain a direct cause of action against the insurance company issuing

> such policy for the amount of the judgment rendered against such assured, * * *."

This is a statute allowing garnishment **after judgment.** If a judgment must first be obtained against the wrongdoer, as a condition precedent to any such direct action, the statute does not really authorize a direct action at all, for its authority to bring a "direct action" is confined to the one situation set out in the law itself. Such a Statute is entirely different from a true "direct action" statute, such as that of Louisiana, passed on by this Court in **Lumbermen's Mutual Casualty Co. v. Elbert,** 348 U. S. 48 (1954), which the Louisiana courts construed as creating a separate and distinct cause of action against the insurer which the injured party may elect **in lieu** of his action against the tort feasor.

Respondent and the Courts below take refuge in the argument (Opinion pp. 6-7, following R. 129) that

> "It prevents a multiplicity of suits and holds the insurer liable who by a circuity of actions would eventually be obligated to pay any judgment rendered against an employer resulting from the negligence of his employee."

To this contention, petitioner responds that the short circuited course so advocated does not prevent, but rather makes circuity of action, but even if it did shorten the proceedings in a given case it would be at the cost of a failure to determine completely the rights of all the parties involved, and, in any event, would be a departure from the specific course prescribed by Arkansas statute.

The case of **Maryland Casualty Company v. Employers Mutual Liability Insurance Company of Wisconsin,** C. A. 2, 1953, 208 F. 2d 731, sometimes cited as authority for the "circuity" argument and relied on by the Court of Appeals below, is readily distinguishable from the case at bar.

In that case, considered by Judge Learned Hand, the pleadings and the judgment in the original suit established beyond question that the original liability of the employer was vicarious, and in that connection, Judge Hand observed (Opinion p. 733):

> ". . . The doctrine that there is no contribution or indemnity between joint tort feasors does not apply, when the liability of one of them **is not for a personal fault**, but because the personal fault of the other is imputed to him . . ." [Emphasis supplied.]

In the **Maryland Casualty Company** case, supra, both the insurance companies involved had contractual obligations to their named insured. The plaintiff insurance company, after paying the judgment, relied on its contract of insurance with the same party in its attempt to enforce its subrogated rights against the other insurance company. But in our case, the plaintiff insurance company has no rights in the insurance contract of petitioner. Moreover, Judge Hand pointed out that the defendant insurance company would not have a direct action against the plaintiff insurance company, but would first have to sue the employee-driver of the vehicle and then, by separate garnishment proceeding, sue the plaintiff insurance company to recover for the driver's rights in the plaintiff insurance company's contract. The Court said, in relevant part (Opinion, p. 733):

> "Therefore, after paying the plaintiff a third of the settlement, the defendant, as surrogate of the Smedley Company, could have obtained a judgment for the same amount against Amendola, the driver; and if Amendola had paid this claim, he could have recovered it from the plaintiff under his policy of insurance. That would have been a complete circuity of action."

Judge Hand, by describing the foregoing as a circuity of action, implies that the defendant's insurer, in this case

Pacific, would have to obtain an independent judgment against the driver who was insured by the plaintiff insurer, in this case Transport. Judge Hand did not say that the defendant insurer had a direct cross-action or counterclaim against the plaintiff insurer. Therefore, it would appear that the defendant insurer would have no direct action against the plaintiff insurer for the tort of the driver insured by the plaintiff insurer. Thus, in our case, if the instant direct action against Pacific were to be allowed, Pacific would be subrogated to the contractual rights of its insured, Fred Russell, against Superior, which, if Pacific were required to present in a separate suit, **would also result in a circuity of action.**

A careful reading of the entire record in this cause discloses beyond question that plaintiff Transport's complaint filed in the District Court below contains no allegation of any kind that the Sikes accident occurred without fault of plaintiff's insured, Superior Forwarding Company. There was not a scintilla of evidence, in any form, adduced before the Trial Judge as to whether or not Superior was negligent, in whole or in part, with respect to the injury sustained by Sikes. In fact, the parties there stipulated, in part (R. 36):

> "Nothing in this paragraph shall preclude either party from proving details of the accident and the location of the truck or its position at the time of the accident."

Notwithstanding such agreement, the entire evidence adduced in the District Court hearing pertained to the question of the coverage of the respective insurers and the contract constituting the agreement under which the truck was leased by Tommy Russell to Superior. Transport, having the burden, failed completely to show that the liability of its insured, Superior, was solely vicarious, failing which the Court had no course but to adopt what it erroneously considered the binding rulings of the State

Courts on that issue.[3] As a consequence, the vital issue of **solely** vicarious liability of Superior was never properly ruled in any court. The State Court heard the evidence on that issue but omitted to rule on it; the Federal Courts did not hear the evidence, but ruled on it without any evidentiary basis and without the intervention of a jury, thus modifying the jury's verdict. This process demonstrates, beyond cavil, that such so-called "direct actions" are sanctioned and undertaken at the expense of a complete failure to litigate the issues of basic liability. Had Transport, as subrogee of Superior, on the other hand, been required to sue the truck driver in the first instance, it could not have avoided an attempt to show that fault for the accident was in no way attributable to Superior. And there would be no question that the truck driver, Fred Russell, would contest that point. This Court observed the difference between the incidents of statutory direct actions and those pursuing the orthodox procedures, when it said in **Lumbermen's Casualty Co. v. Elbert**, 348 U. S. 48, 51 (1954), that the courts of Louisiana distinguished between those cases where the injured party sued the insurer alone and those in which it joined the tort-feasor as an additional party or sued the tort-feasor alone, and noted:

> "In the former action, the insurer is foreclosed from asserting defenses such as coverture, normally available to the tort-feasor. **Edwards v. Royalty Indemnity Co.**, 182 La. 171, 161 So. 191. Similarly, the insurer is severely restricted in advancing technical defenses based upon the terms of the policy, such as a failure of notice, when the injured party brings a direct action. **Jackson v. State Farm Mut. Automobile Ins. Co.**, 211 La. 19, 29 So. 2d 177. * * *"

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[3] Petitioner argued that the matter was not *res judicata*. *Burton v. Kemp*, 378 S. W. 2d 667, 669 (Ark. 1964) and case there cited.

If the only virtue of the short circuit approved in our case is to save time, energy and expense, which is accomplished at the sacrifice of meritorious right of the parties, it would appear, like most short circuits, bad for the continued functioning of the machine. Such direct actions should not be encouraged by this Court, especially when they contravene established State Law.

To the extent, therefore, that Arkansas law prohibits such "direct actions" against the alleged wrongdoer's insurer alone, and to the extent that the federal court, sitting in another State, and not the Arkansas State Courts, sanctioned such a course here, we believe there has been such a departure from the State law as invites the supervision of this Honorable Court.

IV.

The Court of Appeals below has decided important questions of federal law, both (1) in determining what constitutes a claim of sufficient immediacy and maturity to be a case or controversy sufficient to confer jurisdiction upon the federal courts and (2) in approving action amounting to an unconstitutional denial of the right to jury trial. If either of these questions have not been settled by this Court, it would appear that they should be.

It would further appear that the impact of an approval of "direct actions" such as the foregoing upon the business of this Court, together with its potential effect, would be most considerable, and merits this Court's attention.

This Court may notice that by far the largest proportion of all types of cases filed in the federal courts are personal injury cases and like tort actions.[4] It is also

[4] The Annual Report of the Director of the Administrative Office of the United States Courts for the year 1962 shows that of a total of 61,836 cases filed that year, 15,630 were contract actions, includ-

a matter of common knowledge that virtually all automobile drivers and many others are insured against liability and other casualty.[5] The courts' dockets reveal many subrogation cases, in a large number of which all the litigants are insurance companies seeking to recoup their losses one from another by resort to suits for indemnity or contribution. And irrespective of these latter types of cases, there are innumerable suits brought against insurance companies under the "direct action" statutes of those jurisdictions which allow that procedure.

The decision in the case at bar would seem to authorize what amounts to a direct action even in those instances where direct actions are prohibited by State Law, so long as the suit is filed in a Federal rather than a State court. Such is to encourage the filing of such suits in the Federal Courts and to divert them from the State Courts wherever possible. The backlog of pending cases and the delays expected in the state courts will make the federal courts the preferable tribunal. As the requisite citizenship of most insurance companies, so far as diversity is concerned, is seemingly almost always present, and the amount in controversy is commonly a sum exceeding $10,000, it would appear that most such cases would be eligible for filing in the District Courts and would come to this Court for review.

Considering the attitude of respected members of the Court that diversity cases at best present frequently no more than state court questions which so increasingly burden the dockets of this Court, diverting much needed time and energy from such imminent matters as civil rights, anti-trust, labor relations, tax matters and other

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ing 1,725 insurance cases and 4,324 other actions. Tort actions numbered 21,979, consisting of 549 airplane personal injury suits, only 1,074 FELA cases, 5,297 marine injuries, 9,111 motor vehicle cases, and 3,955 other types of personal injuries.

[5] There were 1,725 insurance cases alone filed in 1962.

pressing constitutional questions, **Gibson v. Phillips Petroleum Company** (dissenting opinion), 352 U. S. 874 (1956), and considering the purpose of such Acts of the Congress as its amendment of the Judiciary Act to increase the required jurisdictional amount in controversy, this Court has shown its concern with the probable repetitive character of truly unnecessary federal court litigation. It is hoped that the Court's grant of certiorari in the case at bar will put an end to the instant questions.

In the absence of any readily available statistics as to the number of direct actions presently pending in the federal courts, whether indemnity cases or otherwise, petitioner has been forced to resort to unorthodox means to determine and demonstrate the possible impact of the instant decision.[6] But this Court may have access to data which may more graphically suggest the full extent of these implications, which petitioner is confident will disclose a foreseeable burden of considerable dimension and importance.

CONCLUSION.

For the reasons stated, it is respectfully submitted that this petition for certiorari should be granted.

EDWARD BRODKEY,
315 Plymouth Court,
Chicago, Illinois 60604,
Attorney for Petitioner.

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[6] Inquiries heretofore made of petitioner disclose the pendency of a like case, *Transport Insurance Co. v. Moise Miller et al.* (including Allstate Insurance Co.), being Doc. No. 18,682 in the 16th Judicial District, Parish of St. Martin, Louisiana.

APPENDIX "A".

Opinion of the Court of Appeals.

United States Court of Appeals
For the Eighth Circuit.

No. 17,706

Pacific National Insurance Company,
Appellant,
vs.
Transport Insurance Company,
Appellee.

Appeal from the United States District Court for the Eastern District of Arkansas.

[February 12, 1965.]

Before VOGEL, MATTHES and RIDGE, Circuit Judges.

MATTHES, Circuit Judge.

Transport Insurance Company, plaintiff below, appellee here, instituted this action against Pacific National Insurance Company, one of the defendants below and appellant here, seeking to recover by way of indemnity the amount it had paid on account of a judgment obtained by one Paul Sikes against Superior Forwarding Company and Fred Russell in the Circuit Court of Greene County, Arkansas. Transport was successful in a trial before the

Court, Judge Young, *Transport Insurance Co.* v. *Manufacturers Cas. Ins. Co.*, 226 F.Supp. 251 (E.D.Ark. 1964) and Pacific has appealed.[1]

Superior, a common carrier holding a certificate of public convenience and necessity issued by the Interstate Commerce Commission, leased trucks for use in its trucking operations. On July 19, 1957, Superior transported a large freezer unit from Corning, Arkansas to Paragould, Arkansas, in a truck that had been leased from Tommy Russell. The driver of this truck, Fred Russell, had been furnished by Tommy Russell in accordance with the terms of the leasing agreement. Tommy was Fred's employer, paid Fred's wages and social security and unemployment taxes. Paul Sikes, a laborer, was working on the construction of the building to be occupied by Kroger Grocery Company, the consignee of the freezer unit. At Fred's request, Sikes was assisting in unloading the freezer and because of Fred's negligence, the freezer fell upon Sikes and caused him to sustain serious injuries.

On April 3, 1957, Manufacturers Casualty Insurance Company named as a defendant in this action, had issued to Tommy Russell, a policy of insurance which covered the truck in which the freezer had been transported. Pacific, formerly Pacific National Fire Insurance Company, also named as a defendant, succeeded to the policy liabilities of Manufacturers. Transport was the liability insurance carrier for Superior Forwarding Company.

The policy issued by Pacific to Tommy Russell contained an omnibus clause, providing in substance that with respect to insurance for bodily injury liability, the unquali-

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[1] Hereinafter, we shall refer to Pacific National Insurance Company as Pacific or appellant; to Transport Insurance Company as Transport or appellee; to Superior Forwarding Co. as Superior, to Tommy Russell as named or as Tommy and to Fred Russell as named or as Fred.

fied word "insured" includes the named insured and any person while using the vehicle, provided the actual use of the vehicle is by the named insured or with his permission. Under this provision Fred Russell was covered as an additional insured.

The policy issued by Transport to Superior defined "insured" as the named insured and "if a corporation, any executive officer, managing employee, director, or stockholder thereof while acting within the scope of his duties as such * * *". The trial court found that this policy did not provide coverage to Fred Russell, the truck driver, because as a servant of Superior he was not a named insured within the above quoted clause of the policy. This finding is not challenged by appellant.

Paul Sikes sued Superior, Tommy Russell and Fred Russell in the Circuit Court of Greene County, Arkansas. Pacific, Tommy's insurer, entered into a non-waiver agreement with Tommy and thereafter filed a demurrer in his behalf which was sustained. From the outset of the Sikes' litigation, Transport took the position, and so advised Pacific, that Fred Russell was an insured under Pacific's policy and Transport called upon Pacific to defend Fred. Pacific adamantly refused to do so and Transport took over the defense on behalf of Fred.

Sikes' judgment against Superior and Fred Russell, was affirmed by the Supreme Court of Arkansas, *Superior Forwarding Company* v. *Sikes*, 233 Ark. 932, 349 S.W.2d 818 (1961). Transport satisfied the judgment, and then filed this suit in the United States District Court on the theory that Superior was held vicariously liable for Sikes' injuries, that Superior had the right to proceed by way of indemnity against and recover from Fred Russell, the actual tort-feasor; and that as Superior's subrogee, it is entitled to maintain this action and recover from Fred Russell's insurer.

The threshhold question is whether jurisdiction exists. Appellant strenuously asserts that there was no jurisdiction in the district court, and that we must therefore vacate the judgment and remand with directions to dismiss. Jurisdiction was not challenged in the district court, in fact all parties proceeded as though the court had power to act. However, as suggested by appellant, jurisdiction may not be conferred by consent and lack of jurisdiction of the subject matter cannot be waived by the parties or ignored by the court; if jurisdiction is lacking the trial court should on its own motion decline to proceed and if the case is tried where jurisdiction is lacking, the jurisdiction of the appellate court on review is limited to correcting the error of the trial court in entertaining the action. These principles are fundamental and were recognized and applied by us in the recent case of *Rock Island Millwork Co.* v. *Hedges-Gough Lumber Co.*, 337 F.2d 24, 26-27 (8 Cir. 1964).

Appellant concedes that there is diversity of citizenship and that the jurisdictional amount is present, but contends that the proceeding is not a case or controversy under article III of the United States Constitution and the applicable statutes. Appellant also concedes that the parties hereto stand in the place of their respective insureds, but asserts that appellee had "no standing to sue this defendant, as it did not own a supposed claim against this party" and that "until such time as is determined the extent, if any, of Fred Russell's liability to Superior, there is no basis for any claim in behalf of Superior, or of Superior's subrogee, against defendant Pacific." In other words, appellant's theory is that inasmuch as the question whether Superior was vicariously liable to Sikes has not been litigated and finally adjudicated in an action between Superior or appellee, as its subrogee, and Fred Russell, this proceeding is premature.

In support of its position, appellant directs our attention to the tests to be applied in determining whether the action presents a controversy which a federal court has power to adjudicate—other jurisdictional requirements being present. The tests are clearly enunciated by the Supreme Court in the oft-cited case of *Muskrat* v. *United States*, 219 U.S. 346, 356, 357 (1911) as follows:

> " 'The judicial article of the Constitution mentions cases and controversies. The term 'controversies,' if distinguishable at all from 'cases,' is so in that it is less comprehensive than the latter, and includes only suits of a civil nature. *Chisholm* v. *Georgia*, 2 Dall. 431, 432; 1 Tuck, Bl. Comm. App. 420, 421. By cases and controversies are intended the claims of litigants brought before the courts for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs. Whenever the claim of a party under the Constitution, laws, or treaties of the United States takes such a form that the judicial power is capable of acting upon it, then it has become a case. The term implies the existence of present or possible adverse parties whose contentions are submitted to the court for adjudication.' "

See also *Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227, 240-241 (1937).

By application of the foregoing tests, we are satisfied that at the time this action was commenced, appellant and appellee stood in adverse positions to one another, and appellee's claim was a present, specific right, ripe for determination. The following factors are significant: (1) Fred Russell was an insured under appellant's policy; Superior was insured by appellee; (2) suit had been brought by Sikes against Superior and Fred Russell; (3) Appellant refused to assume the defense of Fred, and appellee in an effort to exonerate its insured from vicarious

liability for the negligence of Fred, undertook the defense of the latter; (4) judgment was rendered against Superior and Fred and affirmed on appeal; (5) appellee paid the full amount of the judgment.

Thus posited, appellee as the subrogee of Superior, was entitled to maintain this action and secure an adjudication of a real and substantial controversy, to-wit, the question whether it was entitled to recover by way of indemnity, the amount it was required to pay in satisfaction of the Sikes' judgment. The argument that it was necessary to first secure a judicial determination that Superior was vicariously liable, in a proceeding directly against Fred Russell has no appealing force.[2] If Superior was entitled to maintain such an action against Fred, we are satisfied that on this record Superior's insurer may proceed against Fred's insurer. See and compare: *Pacific Employers Ins. Co.* v. *Hartford Acc. & Ind. Co.*, 228 F.2d 365 (9 Cir. 1955), cert. denied 352 U.S. 826 (1956); *Maryland Cas. Co.* v. *Employers Mut. Liability Ins. Co.*, 208 F.2d 731 (2 Cir. 1953); *Prickett* v. *Hawkeye Security Insurance Company*, 282 F.2d 294 (10 Cir. 1960). As stated by the Court in *Travelers Insurance Company* v. *General Casualty Company*, 187 F.Supp. 234 (E.D. Idaho 1960) at page 236: "The reason for this rule is obvious. It prevents a multiplicity of suits and holds the insurer liable who by a circuity of actions would eventually be obligated to pay any judgment rendered against an employer resulting from the negligence of his employee".

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[2] If, as appellant argues, such a determination is a prerequisite to this action, we believe the answer may be found in the Sikes' case. Although the state trial court and the Arkansas Supreme Court were not required to and did not in fact expressly rule the question whether Superior's liability was solely vicarious, the undisputed facts together with the trial proceedings and the Supreme Court's opinion compel the legal conclusion that Sikes was injured as the result of Fred Russell's negligence and that Superior's liability was secondary or vicarious.

We are satisfied jurisdiction exists, and accordingly shall proceed to a consideration of appellant's contentions which go to the merits of the case.

The substance of appellant's first contention on the merits is that error was committed by the trial court in finding and concluding that Superior's liability was vicarious in nature. As we have observed, Superior was the lessee of the truck; Fred, the driver was Tommy's employee and was furnished by Tommy in accordance with the terms of the lease. Thus, Fred was the agent of Superior in the latter's common carrier operations, and because of this relationship the law imposed responsibility upon Superior to a third person who sustained damage as the result of Fred's tortious conduct while acting within the scope of his employment. This is a well-settled rule. See 3 Am. Jur. 2d, *Agency*, §267, where it is stated:

> "Fundamentally, and according to both the Restatement and the American courts, there is no distinction to be drawn between the liability of a principal for the tortious act of his agent and the liability of a master for the tortious act of his servant. In both cases, the tort liability is based on the master and servant, rather than any agency, principle; the liability for the tortious act of the employee is grounded upon the maxim of 'respondeat superior' and is to be determined by considering, from a factual standpoint, the question whether the tortious act was done while the employee, whether agent or servant, was acting within the scope of his employment."

The crucial question here is whether both Superior and Fred were guilty of negligent conduct as contended by appellant or whether Superior was held liable solely because of Fred's negligence and under the "respondeat superior" doctrine.

Appellant argues that the proceedings in the Sikes' litigation not only show that this issue was not adjudicated

and determined but that the jury very likely found that the cumulative neglect of both defendants was the proximate cause of the Sikes' accident. Appellant further emphasizes that in Sikes' amended complaint, he alleged that Superior was negligent in certain respects in regard to the delivery and unloading of the freezer unit; that the Court submitted to the jury the question whether Sikes was injured as a result of the negligence of Superior and Fred Russell and that there was a general verdict against both.

We are not persuaded that the foregoing circumstances are conclusive of the issue. The fact is that the evidence establishes beyond peradventure of a doubt that Sikes was injured during the unloading operation and through Fred's negligence. Indeed in the instant action, the parties stipulated that the Sikes' accident "took place in connection with the unloading of the freezer". Superior was under no duty to unload freight as it was operating under a tariff which provided that it was the duty of the consignee to unload freight that was too heavy for the truck driver to handle. And this record does not establish even by inference that Superior had in fact assumed the responsibility of unloading the freezer. In holding that a submissible case was made by Sikes, the Supreme Court of Arkansas ruled that "the jury could have found from the evidence that Fred Russell, acting within the scope of his authority as agent for the trucking company, obtained the services of Sikes to help unload the heavy equipment and that the equipment was in charge of and under the care of Russell until delivery was completed; * * * that Russell was negligent in the manner of unloading the equipment and that as a result of such action, Sikes was injured". *Superior Forwarding Co. v. Sikes*, supra, 349 S.W.2d at p. 819.

While it is true that the Arkansas Supreme Court did not explicitly hold that Superior's liability was vicarious,

that holding is implicit in the opinion, or as stated by Judge Young, "from a careful reading of the Arkansas Supreme Court opinion, the conclusion is compelling that Superior's liability was vicarious with Fred Russell being the active tort-feasor". *Transport Insurance Co. v. Manufacturers Cas. Ins. Co., supra,* 226 F.Supp. at page 254.

Turning to the question of indemnity, and the circumstances under which it may be granted, recognized authority teaches that as against the person whose personal wrong is responsible for harm to a third person, one vicariously liable who has been compelled to respond in damages may have complete indemnity. See Harper & James, *The Law of Torts*, Vol. 1, §10.2, page 723; 27 Am.Jur. *Indemnity*, §18. Judge Young held that this is the law in Arkansas, 226 F.Supp. at page 253. Appellant does not take issue with this rule, but does urge that indemnity is precluded in this case because of the terms of the leasing agreement between Superior and Tommy Russell. We now give consideration to that point.

Paragraph 4 of the agreement provides: "Lessee [Superior] agrees to file with the Interstate Commerce Commission and with the State Regulatory Commissions having jurisdiction in the premises and to keep in full force and effect public liability, property damages and cargo insurance in such amount as may be required under and by the regulations of said commissions".

Appellant asserts that the written lease completely defined the liabilities of the parties thereto for all purposes and that such agreement released and exonerated Pacific, Tommy Russell's insurance company, from all liability. Its position is premised largely on the holding of the court in *American Fidelity & Casualty Company* v. *Simmons*, 253 F.2d 634 (4 Cir. 1958). In *Simmons*, as here, the lessee agreed to carry a liability insurance policy on the leased vehicle. Lessee's insurance company paid a

judgment obtained by an injured party against the lessee and then sought to recover indemnity from the lessor. In affirming the lower court's judgment denying recovery, the Court of Appeals stated, 253 F.2d at p. 636:

> "The lease agreement provided that Webb [Lessee] should procure insurance to cover this liability, and the reasonable interpretation of the agreement is that it should protect against all liability arising out of the operation, not that it should protect merely the liability of Webb with the right of Webb or the insurer to recover over against Simmons the amount of any liability they might be required to pay. Without going into the question as to whether the liability of Webb, without reference to the agreement respecting insurance, is primary or secondary, it would be unconscionable in the light of the provision in the lease agreement, to allow Webb to recover of Simmons indemnity for the liability which Webb had agreed with Simmons to cover with insurance; and, of course, the rights of the casualty company by way of subrogation cannot be superior to the rights of Webb."

The trial court accepted the rationale of the *Simmons* case insofar as the rights of Superior and Tommy Russell are concerned, but reasoned that the instant lease

> "does not prevent Superior or its subrogee from seeking indemnity from defendants on account of the tortious conduct of Fred Russell, their omnibus insured, for whom Superior has been held vicariously liable in the state court action. The liability of defendants in the instant case is predicated upon this theory and the lease contract in no way precludes the relief now sought by plaintiff." 226 F.Supp. at p. 257.

Like the trial court, we do not regard *Simmons* as standing for the proposition that Transport, Superior's insurer, may not seek and obtain indemnity from Pacific whose policy insured Fred Russell the party whose negligence imposed liability on Superior. Stated differently,

we are not inclined to stretch the meaning of the terms and conditions of the lease agreement to the point where Superior, or its subrogee is prohibited from enforcing an existing legal right against one who is not a party to the agreement.

Furthermore, appellant's lease theory must be rejected for the additional reason that the insurance provision upon which it relies had been modified by the parties and under the agreement as modified, the obligation of Superior and Tommy in regard to liability insurance was materially changed.[3] The evidence discloses without substantial dispute, that at all times during the existence of the leasing agreement, it was mutually agreed that Tommy was to procure a liability insurance policy on the leased vehicle which would cover its use, whether in behalf of Superior or otherwise.[4] Tommy complied with this agreement as evidenced by Pacific's policy under which Tommy, and

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[3] The trial court made no specific finding or reference to the modification, apparently because it was satisfied that the written agreement constituted no legal impediment to appellee's right to indemnity.

[4] An officer of Superior testified: "It was my desire and intention that Mr. Tommy Russell provide a primary type of coverage because of the nature of this relationship not knowing whether the vehicles, for instance, would be legally taken out sometimes during the middle of the night, or perhaps someone might be inclined to do some unauthorized drinking and get us involved in a serious situation there of a particular accident or other serious injury and, for that reason, I felt that we should have that type of coverage for Superior. I required this of him and I required this of another similar commission or agency in a different city in the State of Arkansas.

* * * * * * *

"Q. Did he take out insurance from 1952 to the termination of his business with you in 1960 or '59? A. Yes, sir."

* * * * * * * *

On cross-examination Tommy testified: "Q. Tommy, since 1952, through 1957, did you have an understanding with Superior that you would keep your trucks that were leased to them insured for public liability? A. Well, I am supposed to keep them insured."

any other person using the vehicle with his permission, were insured.

Finally, appellant contends that the court erred in failing to limit any recovery by Transport from Pacific to an amount prorated between them in proportion to the respective policy limits of the parties. We are of the view that the co-insurance, excess or pro rata provisions in appellant's policy are not applicable, and that this contention is without merit.

The judgment is affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX "B".

Judgment.

United States Court of Appeals
For the Eighth Circuit.

No. 17,706.

September Term, 1964.

Pacific National Insurance Company, Appellant,

vs.

Transport Insurance Company.

} Appeal from the United States District Court for the Eastern District of Arkansas.

This cause coming on to be heard on the record from the United States District Court of the Eastern District of Arkansas, and was argued by counsel.

On Consideration Whereof, It is now and here Ordered and Adjudged by this Court that the Amended and Substituted Judgment of the said District Court entered February 27, 1964, in this cause be, and the same is, hereby affirmed.

February 12, 1965.

APPENDIX "C".

(Order staying issuance of Mandate, etc.)

United States Court of Appeals
For the Eighth Circuit.

No. 17,706.

Pacific National Insurance Company, Appellant, vs. Transport Insurance Company.	Appeal from the United States District Court for the Eastern District of Arkansas.

On Consideration of the Motion of the appellant for a stay of the mandate in this cause pending a petition to the Supreme Court of the United States for a writ of certiorari, it is now here Ordered by this Court that the issuance of the mandate herein be, and the same is hereby stayed for a period of thirty days from and after this date, and if within said period of thirty days there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for a writ of certiorari and record have been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

March 3, 1965.